INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
Argument	10
Conclusion	15

CITATIONS

Cases:

Blockburger v. *United States*, 284 U. S. 299	12
Burton v. *United States*, 202 U. S. 344	12
Cohen, Ex parte, 191 F. 2d 300	11
Cohen v. *United States*, 201 F. 2d 386, certiorari denied, 345 U.S. 951	12
Cooper v. *United States*, 282 F. 2d 527	11
Ebeling v. *Morgan*, 237 U. S. 625	12
Gavieres v. *United States*, 220 U. S. 338	12
James v. *United States*, 366 U. S. 213	15
Knowles v. *United States*, 224 F. 2d 168	11
Lawn v. *United States*, 355 U.S. 339	12
Marzani v. *United States*, 168 F. 2d 133, affirmed, 335 U. S. 895	11
Maxfield v. *United States*, 153 F. 2d 325, certiorari denied, 327 U.S. 791	11
Smith v. *United States*, 257 F. 2d 133	14
United States v. *Ballard*, 322 U. S. 78	13
United States v. *Bardin*, 224 F. 2d 255, certiorari denied, 350 U. S. 883	12
United States v. *Beacon Brass Co.*, 344 U. S. 43	11
United States v. *Brott*, 264 F. 2d 133, certiorari denied, 359 U. S. 985	11
United States v. *McCue*, decided March 20, 1962	11
United States v. *Mollet*, 290 F. 2d 273	12

Constitution and statutes:

	Page
Constitution of the United States, First Amendment	13
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):	
Sec. 272(k)	2, 3
Sec. 273(a)	3
Sec. 273(b)	3
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 7201	3, 5, 6, 8, 11
Sec. 7206(4)	4, 5, 8
18 U.S.C. 1001	4, 5, 9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 795

MEYER HARRIS COHEN, also known as MICHAEL "MICKEY" COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as amended following petition for rehearing (Pet. App. "A."), is reported at 297 F. 2d 760.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1962 (Pet. App. "B."), and the petition for rehearing was denied February 14, 1962

(5 C.T.).[1] The petition for a writ of certiorari was filed on March 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the notice of deficiency was properly mailed to the taxpayer's last known address.

2. Whether a taxpayer who has been convicted for willful attempted evasion of income taxes for specific years by filing fraudulent returns may thereafter be prosecuted for subsequent willful attempts to evade the payment of the taxes assessed for those years.

3. Whether it was improper to permit the prosecution to elicit testimony as to the taxpayer's religious activities, which testimony was relevant to proof of unreported income obtained by false pretenses.

4. Whether an oral denial to a revenue agent constitutes a false statement within the meaning of 18 U.S.C. 1001.

5. Whether monies obtained by extortion and false pretenses in 1957 and 1958 constituted taxable income for those years.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

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[1] We shall adopt petitioner's method (Pet. 1) in referring to the Clerk's transcript in the trial court, the Clerk's transcript in the court below, and the Reporter's Transcript of the trial.

(k) *Address for notice of deficiency.*—In the absence of notice to the Commissioner under section 312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this chapter, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a

felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

* * * * *

(4) *Removal or concealment with intent to defraud.*

Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; * * *

* * * * *

shall be guilty of a felony * * *.

Title 18, United States Code:

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 16, 1960, petitioner was indicted on thirteen counts (2 C.T. 2-15) in the United States District Court for the Southern District of California. Counts Two and Three charged petitioner with willful attempted evasion of income taxes for the respective years 1957 and 1958, in violation of 26 U.S.C. 7201. Count Four charged petitioner with willfully attempting, during the years 1955-1960, to evade the payment of income taxes duly assessed for the years 1945 to 1950, inclusive, by various fraudulent means, in violation of 26 U.S.C. 7201. Counts Five, Eight, Nine and Ten charged petitioner with violations of 26 U.S.C. 7206(4) in that he concealed property on which levy was authorized, with intent to evade the payment of income taxes then due, for the years mentioned in Count Four. Count Thirteen charged petitioner with violation of 18 U.S.C. 1001 by making a false statement to the Internal Revenue Service as to his assets in 1957.

After a jury trial lasting approximately eight weeks, petitioner was convicted on these eight counts (3 C.T. 592). On July 1, 1961, he was sentenced to imprisonment for five years under Counts Two, Three and Four, and fined $10,000 on each, the fines cumulative and the prison terms consecutive (1 C.T. 2). Although petitioner was also sentenced to imprisonment and fined under the remaining counts, these fines and prison terms were made concurrent with those imposed under Counts Two, Three and Four (1 C.T. 2). Since the sentences were concurrent, the court of appeals affirmed the conviction upon finding

that the conviction on Counts Two, Three, and Four was free from error (Pet. App. "A." 1-2).

The evidence to support the verdict of guilt on each of these eight counts may be briefly summarized as follows:

1. Counts Two and Three (2 C.T. 4-5) charged petitioner with violations of 26 U.S.C. 7201 by filing false and fraudulent income tax returns for the years 1957 and 1958, respectively. Petitioner filed joint income tax returns for 1957 and 1958, reporting income of $1,272.84 in 1957, and reporting no income at all in 1958. The government proved that petitioner omitted from gross income $46,643.30 in 1957, and $56,200 in 1958. These amounts consisted of the following: (1) compensation of $1,000 for promoting a moving picture based on a book called "Gus the Great" (R.T. 878, 880); (2) compensation of $2,350 for promoting the career of Janet Schneider, an aspiring singer (R.T. 830, 832); (3) interest income of $1,795.30 on United States Savings Bonds (R.T. 789); (4) compensation of $3,000 for acting as an "arbitrator" in settling a dispute between two rival vending machine operators (R.T. 3534, 3535, 5847-5848); (5) $1,000 obtained from W. C. Jones by trick, *i.e.*, petitioner represented to Jones that this money was needed to pay certain legal expenses (R.T. 775, 776), when in fact petitioner had already paid these expenses (R.T. 815-816), and kept the money obtained from Jones for his own use; (6) $5,000 obtained from Aubrey Stemler by trick, *i.e.*, petitioner represented to Stemler that he needed this money to pay unpaid sales taxes and labor bills in order to

clear the escrow and complete the sale of his greenhouse business, when in fact this business had already been sold by petitioner's sister, and petitioner did not use this money for any of the purposes so represented by him (R.T. 1375, Ex. 179.); (7) "life story" income consisting of $32,500 in 1957 and $56,200 in 1958, received from the following individuals:

1957

Bernard Koomer (R.T. 2121, 2122, Ex. 320)	$15,000.00
Aubrey V. Stemler (R.T. 1360, 1388)	10,000.00
Leonard Krause (R.T. 1188, 1199, Exs. 327-341)	5,000.00
Charles Schneider (Ex. 272)	2,500.00
Total	$32,500.00

1958

Leonard Krause (R.T. 1188, 1199)	$20,000.00
Louis Leitner (R.T. 1924, 1925)	9,750.00
Max Feigenbaum (R.T. 1610-1611, 1562-1567)	18,950.00
Joseph Bishop (R.T. 1409-1417)	7,500.00
Total	$56,200.00

Petitioner had granted to each of these individuals the right to receive a certain percentage of all proceeds derived from any commercial ventures based on his life story. While most of these transactions had been cast in the form of "loans," the government introduced evidence to prove that this money had been obtained either by extortion, as in the case of Koomer (R.T. 2416-2420), or by fraud, in that petitioner had already sold the rights to his life story in June, 1951, to Henry Guttman, under a written agreement providing for a 50-50 split of the proceeds between petitioner and Guttman (R.T. 2715-2717, 2757-2758, Ex.

182). The evidence further showed that at approximately the same time that petitioner was receiving these monies for the sale of his life story, he had, despite the Guttman transaction, entered into negotiations for the sale of his life story with two authors, Ben Hecht and Dean Jennings; the oral agreement with Hecht provided for a 50-50 division of any proceeds realized from a book to be written by Hecht on petitioner's life (R.T. 2300-2305). Neither Hecht nor Jennings were aware of the Guttmann contract (R.T. 2310, 5741); nor were any of the other parties from whom petitioner received money for the sale of his life story aware of the Guttmann or Hecht agreements (R.T. 835-836, 1287, 1364, 1424-1425, 1945).

2. Counts Four, Five, Eight, Nine and Ten (2 C.T. 6, 7, 10, 11, 12) charged petitioner with violations of 26 U.S.C. 7201 and 26 U.S.C. 7206(4) in that during the years 1955 to 1960, he willfully attempted to evade the payment of income taxes for the years 1945-1950 then due, owing and duly assessed against him in the amount of $135,847.94, by misrepresenting to, and concealing from, the United States of America the true state of his financial affairs. During a period (1955-1960) in which he owed over $135,000 in back taxes, and at a time when he denied owning any assets with which to pay these taxes (R.T. 5221-5222), the evidence showed that petitioner so arranged his financial affairs as to conceal from the government assets with which he could have paid his taxes. These arrangements may be briefly illustrated as follows: Petitioner caused certain Cadillac automobiles to be registered in the names of others,

even though each vehicle was selected, used and controlled by him (R. T. 6147-6149, 6175-6181, 7262, 7565). Petitioner placed a valuable diamond ring and his collection of jewelry with various individuals to hold as security in certain financial transactions (R. T. 2403-2414, 3729-3748, 3806, 7098, 7104). He also caused his diamond ring to be pawned in the name of a friend, Alvin Beaudoin, who turned over the money ($3,000) and the pawn ticket to petitioner (R. T. 3915-3927, 3939-3973, 4412). Petitioner further paid out and received extensive amounts of currency (R. T. 2068-2069, 2892, 5875), caused numerous personal obligations to be paid through and in the names of other persons (Exs. 592, 945), caused thousands of dollars to be paid to him through and in the names of other persons (Exs. 383, 385, 386, 425-427, 435), and paid, and caused to be paid, his creditors other than the United States of America (R. T. 2260-2279; Exs. 910, 913-917).

3. Count Thirteen (2 C. T. 13) charged petitioner with violating 18 U.S.C. 1001 on September 18, 1957, by falsely stating to the Internal Revenue Service that no person had any property or rights belonging to petitioner exclusive of the rights in a book concerning his life story. On September 18, 1957, petitioner was summoned to testify about his financial ability to pay taxes. (R. T. 5209-5210.) After being placed under oath (R. T. 5213), he was asked the following question by Agent McCown of the Internal Revenue Service (R. T. 5222):

Q. Does anyone have any property or rights belonging to you exclusive of the book or its potential worth?

A. (By petitioner) No, sir.

That petitioner knew this reply to be false was demonstrated by the evidence which revealed that petitioner, at the time of the interview, owned various items of jewelry which had been placed with others (R. T. 3742-3748), and had, on the very day of this conference, arranged for the trade-in of a 1957 Cadillac El Dorado Seville on a 1957 Cadillac El Dorado Brougham costing over $13,000, which he caused to be registered in the names of others (R. T. 6160-6164; Ex. 198).

ARGUMENT

The decision of the court of appeals, affirming the conviction, is clearly correct. No conflict of decision or important question of law is involved. Further review by this Court is unwarranted.

1. Little need be added to the careful analysis of the court of appeals (Pet. App. "A." 17-25) in rejecting petitioner's argument (Pet. 9-19) that the statutory notices of deficiency were not sent to him at his "last known address." When the first notice of deficiency was mailed on August 9, 1951 (as to years 1945-1948), to the Moreno Avenue address, the following undisputed facts were evident: the Moreno Avenue address was the address shown in petitioner's tax returns for those years; petitioner's wife was living at this address; there was no notification to the

Commissioner that separate residences had been established; and petitioner, though incarcerated at that time in the Los Angeles County jail, had filed an application for bail pending appeal, and the decision of the court with respect to the application (*Ex parte Cohen*, 191 F. 2d 390 (C. A. 9th)) had not yet been made. In view of the transient nature of petitioner's "address" at the Los Angeles County jail, the court of appeals was clearly correct in upholding the trial court's ruling as to the last known address, the determination of which "becomes a matter of proof in each case in which the question arises." *Maxfield* v. *United States*, 153 F. 2d 325, 326 (C. A. 9th), certiorari denied, 327 U.S. 794. The court of appeals also noted (Pet. App. "A." 23) that the deficiency notices for the years 1949-1950, mailed to petitioner at the Moreno Avenue address on May 8, 1952, were sent in literal compliance with the statute since the Commissioner was unaware that petitioner's wife had moved from this address, and had not been notified that separate residences had been established. Moreover, since petitioner, while in confinement in the Los Angeles County jail, was personally served on July 13, 1951, with notice and demand to pay his back taxes for the years 1945 to 1948, inclusive (R. T. 5056-5059), his purported lack of knowledge of the government's concern in this matter seems highly doubtful.

2. There is no merit to petitioner's assertion (Pet. 20-25) that he was twice placed in jeopardy by his conviction under Count Four of the indictment. Contrary to petitioner's claim that 26 U.S.C. 7201 sets forth but one offense, the disjunctive wording of the

statute clearly defines two offenses, *i.e.*, a willful attempt to evade any "tax," and a willful attempt to evade "the payment thereof." This precise distinction was recognized in *United States* v. *Mollet*, 290 F. 2d 273, 274 (C. A. 2d). Cf. *United States* v. *Bardin*, 224 F. 2d 255, 259-260 (C. A. 7th), certiorari denied, 350 U.S. 883; *Lawn* v. *United States*, 355 U.S. 339, 361-362. Moreover, even if the statute proscribed only one offense, repeated attempts to violate the statute, if proved, as in the present case (see Pet. App. "A." 16-17), may each be punishable as a separate offense even if the attempts occur in the same year. See *Burton* v. *United States*, 202 U. S. 344, 380-381; *Gavieres* v. *United States*, 220 U. S. 338, 343; cf. *Ebeling* v. *Morgan*, 237 U. S. 625, 629-630; *Blockburger* v. *United States*, 284 U. S. 299, 303.

It is clear that petitioner committed two separate offenses even though the offenses involved the same years. On June 20, 1951, petitioner had been found guilty of the willful attempt to evade and defeat income taxes for the years 1946, 1947 and 1948, by filing false and fictitious tax returns. See *Cohen* v. *United States*, 201 F.2d 386 (C.A. 9th), certiorari denied, 345 U.S. 951. Subsequently, the Commissioner authorized jeopardy assessments against petitioner for the tax years 1945 through 1948 (R.T. 5026-5028, 5055-5060; Ex. 683) and regular assessments against petitioner for the years 1949 and 1950 (R.T. 5025-5053; Ex. 844). From 1955 to 1960, however, petitioner willfully attempted to evade the payment of the taxes for the years 1945-1950 due, owing and duly assessed against him, by so arranging his

financial affairs as to conceal from the government the assets with which he could have paid the taxes. Petitioner was subsequently indicted and convicted under Count Four of the indictment for this evasion in 1955-1960 of the payment of income taxes for the years 1945-1950. (See the Statement, *supra*, pp. 8-9.) The fact that the later conviction involved three of the same years as the earlier conviction is immaterial since the repeated attempts to violate the statute were punishable as separate offenses.

3. Petitioner misplaces his reliance on *United States* v. *Ballard*, 322 U. S. 78, in arguing (Pet. 25-29) that the testimony of witness W. C. Jones and the prosecuting attorney's argument concerning that testimony violated petitioner's rights under the First Amendment. Aside from the fact that petitioner made no objection to the testimony when given (R. T. 765-766), or to the prosecutor's comments when made (R. T. 7648-7649), the present situation is not within the rationale of the *Ballard* case. Jones'

In any event, petitioner was in no way prejudiced by the inclusion of the alleged double jeopardy years, 1946-1948, in Count Four of the indictment. Petitioner overlooks the fact that his conviction on Count Four was for evading the payment of taxes for the years 1945 to 1950, inclusive, and was not for the "very same years" (Pet. 21) at issue in the earlier trial. The jury, by its verdict of guilty on this count, must have found that, during the years 1955 to 1960, petitioner had commited certain acts of misrepresentation and concealment (see the Statement, *supra*, pp. 8-9), which constituted an evasion of the payment of taxes for 1945 to 1950. The jury would have had no logical basis for concluding that petitioner committed such acts only for the purpose of evading his taxes for the alleged double jeopardy years, and not for the other years involved.

testimony was not introduced to show the "truth or falsity of * * * [petitioner's] beliefs or doctrines" (322 U.S. at 88); the testimony was relevant to the issues in the case (Pet. App. "A." 8); and in any event it "was minor and incidental to a showing of wholesale frauds and some extortion, entirely unconnected with religion" (Pet. App. "A." 8).

4. The court of appeals found it unnecessary to pass on petitioner's contention (Pet. 30-31), concerning his conviction under Count Thirteen for the making of a willful false statement to a government agency because the sentence on this count was concurrent with other counts. In any event, the contention is without merit for 18 U.S.C. 1001 applies to both oral and written statements. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *Marzani* v. *United States*, 168 F.2d 133, 141-142 (C.A. D.C.), affirmed by an equally divided Court, 335 U. S. 895; *United States* v. *McCue*, decided March 20, 1962 (C. A. 2d); *United States* v. *Brott*, 264 F. 2d 433 (C. A. 2d), certiorari denied, 359 U. S. 985 (both oral and written statements); *Cooper* v. *United States*, 282 F. 2d 527 (C. A. 9th); *Smith* v. *United States*, 257 F. 2d 133 (C. A. 10th); *Knowles* v. *United States*, 224 F. 2d 168 (C. A. 10th).

5. There is no substance to petitioner's contention (Pet. 32-33) that the "uncertain" state of the law during the prosecution years, 1957 and 1958 (Counts Two and Three), made it impossible for him to "know" that monies obtained by fraud constituted taxable income. As the court of appeals observed (Pet. App. "A." 14):

> * * * [A]t the times here in question, the law was that all unlawful gains, including those procured by fraud and extortion, were taxable, with but one exception—embezzled money [an exception later eliminated in *James*]. The Supreme Court made this clear in *Rutkin*.

This Court, in *James* v. *United States*, 366 U. S. 213, 218, stated that "[i]t had been a well-established principle, long before either *Rutkin* or *Wilcox*, that unlawful, as well as lawful, gains are comprehended within the term 'gross income.' " Petitioner's analogy to the *James* case is therefore not well taken, for embezzlement was not one of the methods petitioner chose to perpertrate his fraud.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1962.